proper application of the rule in Shelley's Case to discover an entail, and an analogous application of the rule against perpetuities where personalty is given over after the death of the first legatee without issue. Both rules have been indiscriminately termed the rule in Shelley's Case. *Glover v. Condell, supra; Mason* v. *Pate's Ex'r* (1859) 34 Ala. 379.

The decision of the Delaware court is commendable. It is not to be wondered that eminent judges have been puzzled to discern by what process the intention of a donor of personalty must be defeated by the operation of a rule which acts upon a remainder to the "heirs" of one who takes an estate of freehold, because of the technical meaning of that word when applied to real property. *Herrick v. Franklin* (1868) L. R. 6 Eq. 593; *Smith* v. *Butcher* (1878) L. R. 10 Ch. D. 113. It is curious, also, that courts of equity should have felt bound to follow, at least to an extent, an arbitrary rule of real property at common law, when sustaining interests in chattels unknown to the common law.

PROPER USES OF A HIGHWAY WHERE THE FEE IS IN THE ABUTTING OWNER.—The conflict between the common law, on the one hand, and the needs of a developed commercial society, on the other, has produced considerable confusion in the determination of the proper uses to which a highway may be put, where the fee is in the abutting owner. Undoubtedly, at common law, the right obtained by the public from the abutting owner was merely a right to pass and repass. 1 Ro. Abr. 392, B, 1, 2; *Goodlittle* v. *Alkar* (1757) 1 Burr. 133, 143. Apparently, this still remains the rule in England, *Goodson* v. *Richardson* (1874) L. R. 9 Ch. App. 221; *Galbreath* v. *Armour* (1845) 4 Bell. App. Cas. 374, where there is no need of modification since a new burden may be imposed by Parliament. The Massachusetts courts early succumbed to the demand for new highway uses. *City of Boston* v. *Richardson* (1866) 13 Allen 146, 159-161. It is said that the abutting owner dedicated the highway for all uses adding to the public convenience and for all purposes of intercommunication. *Pierce* v. *Drew* (1883) 136 Mass. 75; *Sears* v. *Croker* (1904) 94 Mass. 586. This doctrine has been followed in other jurisdictions, *Cater* v. *N. W. etc. Tel. Co.* (1895) 60 Minn. 539; *Briggs* v. *Lewiston etc. R.R.* (1887) 96 Me. 363; *People* v. *Eaton* (1894) 100 Mich. 208, but has not met with general favor. Elliott, Roads & Streets (2nd Ed.) 764-5. Two criticisms may be suggested: first, that it amounts to an implication in law of an intention in the dedicator which doubtless had no existence in fact; second, that the logical application of the rule deprives the abutter of all enjoyment of the fee. These courts, however, forced to admit that a consistent application would produce hardship, have been compelled to modify it to the extent of holding that a steam railroad is an additional burden on the fee. *Carli* v. *Stillwater* (1881) 28 Minn. 373.

A majority of courts, however, have sought a more equal balance of the conflicting interests. The cases may be separated into two classes: first, those in which it is attempted to devote the highway to new forms of travel; second, those in which it is sought to establish new uses not connected with passing and repassing. New York, as illustrated by a recent decision,

Duncan v. *Nassau Elec. R. R. Co.* (1908) 111 N. Y. Supp. 210, has taken a stand against the overwhelming weight of authority, Elliott, Roads and Streets (2nd Ed.) p. 755, n. 1, in holding that a street railway, included within the first class, is not a proper exercise of the right of passage, since there is a permanent appropriation of a part of the abutter's fee. *Craig* v. *Rochester R. R. Co.* (1868) 39 N. Y. 404; *Eels* v. *A. T. & T. Co.* (1894) 143 N. Y. 133, 140. Arguments favoring the contrary view seem founded upon no solid basis. It is believed that, from the standpoint of policy, the interests of the corporation do not outweigh the common law right of the abutter. That the legislative authorization amounts to the appointment of an agent to improve the highway, *Craig* v. *Rochester R.R. Co., supra,* dissenting opinion, is answered by the rule that only such improvements can be made as add to the highway's more beneficial enjoyment by all methods of travel. Cf. *Muhlker* v. *New York & Harlem R.R. Co.* (1904) 197 U. S. 544; *Sauer* v. *New York etc. R.R. Co.* (1906) 205 U. S. 526; but see *Wolfe* v. *Covington etc. R.R. Co.* (Ky. 1854) 15 B. Mon. 404. As pointed out by a well-known text writer, Lewis, Em. Dom. §115, i, if one track may be laid, innumerable may follow, thus excluding all other methods of travel. The courts opposed to the New York view, finding it necessary to limit the application of their doctrine that a street railway is not an additional burden, *Hinchman* v. *Patterson Horse R. Co.* (1864) 17 N. J. Eq. 75, attempt to distinguish between such a use and that by a commercial railroad. Elliott, Roads & Streets (2nd Ed.) 697. The difference in motive power, it is generally agreed, is immaterial. *Williams v. City El. Co.* (1896) 41 Fed. 556. That local traffic is not thereby aided seems of no consequence, for roads as a means of passage, are established for all inhabitants of the state. *Hodgdon* v. *Haverill* (1907) 193 Mass. 406, 410. If the carriage of freight is the ground of distinction, it may be answered that the highway was never exclusively limited to the transportation of passengers. *Montgomery* v. *Santa Anna etc. Co.* (1894) 104 Cal. 186; *Mordhurst* v. *Fort Wayne* (1904) 3 St. Ry. R. 182; *contra, Wilder* v. *Aurora etc. Tract. Co.* (1905) 16 Ill. 497. The same criticisms may be made of the subtler distinctions as to an electric railway connecting distant points and carrying light freight. *Abbott* v. *Milwaukee Tract. Co.* (1906) 126 Wis. 634, 4 L. R. A. N. S. 202 n. It is, therefore, suggested that the New York doctrine, affording a test easy of application, is more acceptable from the standpoint both of logic and practicability.

Though a highway exists primarily for purposes of travel, it may now, concededly, be devoted to other purposes of a public nature. Lewis, Em. Dom. §126. From the analogy to the right of the public to build drains, always considered a proper exercise of the power to improve, the erection of sewers was early held to create no additional burden on the fee. *Cone* v. *Hartford* (1859) 28 Conn. 363; *Kelsey* v. *King* (1860) 62 Barb. 410. Similarly, the laying of water mains or gas pipes is considered a proper highway use. *Witcher* v. *Holland Water Works Co.* (1893) 66 Hun 619; *McDevit* v. *People's Nat. Gas Co.* (1894) 160 Pa. St. 367. These secondary uses, however, are improper if they interfere with the primary right of passage. Though extending the common law, they are justifiable because of the vital public necessity for proper sanitation and protection. On the

one hand, they indirectly improve the highway as a means of travel since it is thereby drained, lighted, etc. On the other, they afford the abutting owner an incidental benefit of material value. Both elements, it is conceived, are essential to make the use a proper one. Thus the stringing of telephone wires, though of incidental benefit to the abutter, would be improper, for it in no way affects the public interest. 4 Harv. L. Rev. 240. Conversely, a use beneficial to the public would impose a new burden if the abutter received no incidental benefit. Thus a sewer built, not for the benefit of the abutting owners of the highway through which it passes, but for those of a nearby town, is not a proper use of the highway. *Van Brunt* v. *Flatbush* (1891) 128 N. Y. 50. It is only upon the latter rule that the distinction between the servitudes to which urban and rural highways may be subjected, can be supported. To say that the uses of a highway vary according as the highway is situated in the city or in the open country is hardly supportable. Most urban streets were originally rural roads. The mere change of surroundings cannot be deemed to have increased the purposes for which the abutting owner dedicated the highway. Lewis, Em. Dom. 91, c. Clearly, it may be added, uses neither required by considerations of a public nature nor affording benefit to the abutter are an additional burden on the fee. *Eels* v. *A. T. & T. Co., supra.*

WAIVER OF THE RIGHT TO TRIAL BY TWELVE JURORS IN CRIMINAL ACTIONS. —The United States Circuit Court of Appeals, First Circuit, has recently held (Aldrich, J., dissenting) that the guaranty in the Federal Constitution of trial of crimes by jury is something which the accused has no power to waive; and that the jury contemplated is a body of twelve. *Dickinson* v. *U. S.* (1908) 159 Fed. 801. Accordingly, contrary to a ruling of Chief Justice Shaw on similar facts, *Com.* v. *Dailey* (1853) 12 Cush. 80, a verdict of conviction rendered by ten jurors was set aside, notwithstanding the defendant's agreement upon the discharge of the two jurors that the trial, already well under way, should continue with unimpaired force, and although the offense, while an "infamous crime," see *Ex parte Wilson* (1885) 114 U. S. 417, was a misdemeanor only.

Whether a person accused of a crime within the constitutional guaranty, see *Callan* v. *Wilson* (1887) 127 U. S. 540; *Schick* v. *U. S.* (1904) 195 U. S. 65, can legally consent to trial by a judge alone or with less than twelve jurors is almost a new Federal question; but it has arisen often under State Constitutions, and with inharmonious results. This disagreement is due to the existence of three distinct conceptions of the guaranty itself. *Per* Mitchell, J., in *State* v. *Woodling* (1893) 53 Minn. 142. According to the first view, it is a privilege intended merely for the benefit of the accused, *State* v. *Sackett* (1888) 39 Minn. 69, like other Constitutional guaranties which concededly may be waived, e. g., the right to a jury in civil suits, *U. S.* v. *Rathbone* (1835) 2 Paine 578, trial in the county where the crime was committed, *Dula* v. *State* (Tenn. 1835) 8 Yerg. 511, and the right to be confronted by the State's witnesses. *State* v. *Polson* (1870) 29 Ia. 133. Where the provision for the trial of crimes by jury occurs in the "bill of rights", cf. *Edwards* v. *State* (1883) 45 N. J. L. 419, or its